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BY ELECTRONIC MAIL

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**Re: Pilgrim Nuclear Power Station, NRC Docket Nos. 50-293 & 72-1044 –
Objection of the Commonwealth of Massachusetts to Proposed Staff Action
on License Transfer Application and Exemption Request**

Dear Mr. Campbell and Mr. Wall:

By application dated November 16, 2018 (ADAMS Accession No. ML18320A031) (Application or LTA), Entergy Nuclear Operations, Inc. (Entergy) and Holtec International (Holtec) (collectively, Applicants) requested the transfer of the Renewed Facility Operating License No. DPR-35 for the Pilgrim Nuclear Power Station (Pilgrim) and the general license for Pilgrim's Independent Spent Fuel Storage Installation (ISFSI) from Entergy to Holtec, an unconditioned exemption to use Pilgrim's Decommissioning Trust Fund to pay for site restoration and spent nuclear fuel management costs (incorporated into the LTA by LTA Enclosure 2) (Exemption Request), and a "conforming" amendment to Pilgrim's license to reflect the requested transfer. As part of the state consultation process required by NRC regulations and as discussed with NRC Staff on August 13 and 14, 2019, we are submitting this letter on behalf of the Commonwealth of Massachusetts to object to the NRC Staff's intention to issue an order approving Applicants' license transfer request and Holtec's Exemption Request. Consistent with NRC practice, we also request that NRC Staff include the following response in the State Consultation Section of its Safety Evaluation Report (SER).

At the outset, the Commonwealth objects to the proposed action based on the procedural irregularities and disparate treatment of the Commonwealth during the consultation process as compared to other similarly situated states. On August 13, 2019, the NRC State liaison contacted the Massachusetts Executive Office of Energy and Environmental Affairs with an offer for NRC Staff to consult with the Commonwealth about the Staff's proposed actions during a narrow two-hour window later that day. By mutual agreement, that "consultation" meeting was scheduled for 1:30 pm on August 13, 2019. Approximately twenty-minutes prior to that meeting, however, NRC Staff filed into the above referenced proceeding a "Notification," which informed the proceeding participants that Staff had notified the Commission that Staff intended to issue an order approving the license transfer application and Exemption Request on or about August 21, 2019.¹ Even though the NRC Staff had not yet consulted with the Commonwealth on that intended action, the Notification also indicated wrongly that NRC Staff had *already* notified the Commonwealth of the proposed actions. During the "consultation" call that *followed* the Notification's filing in the docket, the NRC Staff initially declined even to describe the contents of the just filed public Notification and refused to provide any details regarding what the anticipated approval Order would say or the findings underlying it in the anticipated SER. This conduct is not consistent with the NRC's state consultation requirements under, *inter alia*, 10 C.F.R. § 50.91 or the respect due to a sovereign state that has raised serious concerns about the requested actions. Nor is this a situation where an "emergency" would excuse the Staff's obligation to "make a good faith attempt to consult with" the Commonwealth of Massachusetts before NRC Staff or the Commission acts. *See* 10 C.F.R. § 50.91(b)(4).²

In another example of a lack of meaningful consultation, NRC Staff, on August 14, 2019, rejected the Commonwealth's request for fourteen days to provide to Staff the Commonwealth's written views on the proposed action prior to the Staff's taking any final action. Instead, in conflict with the state consultation process with the State of New Jersey for the recent transfer of Oyster Creek Nuclear Generating Station's operating license, NRC Staff informed the Commonwealth that it would have five business days (close of business on August 21, 2019) to offer any written comments to Staff on the intended actions. In support of its request for fourteen days, the Commonwealth had noted during its August 13 and August 14, 2019, conversations with NRC Staff that the Staff had just recently given the State of New Jersey fifteen days from the initial notification of the Staff's intention to approve the Oyster Creek license transfer application to submit an official written response to the Staff's proposed action.³

¹ Notification of Significant Licensing Action (NSLA) (ADAMS Accession No. ML19225D006).

² The NRC Staff also argued that its obligation to consult with the Commonwealth was limited to the *conforming amendment* sought by the Applicants. The NRC requirements, however, do not so narrowly limit the state consultation process, and, in any event, NRC Staff's approach would undermine the very purpose of state consultation to solicit state input about the *substance* of proposed NRC actions that have the potential to pose environmental and public health risks to the state and its residents.

³ *Safety Evaluation by the Office of Nuclear Reactor Regulation and Office of Nuclear Material Safety and Safeguards, Related Request for Direct Transfer of Control of Renewed Facility Operating License No. DPR-16 and the General License for the Independent Spent Fuel Storage Installation from Exelon Generation Company, LLC to Oyster Creek Environmental*

Upon receipt of New Jersey's written response, NRC Staff then incorporated New Jersey's written response into the state consultation section of the SER.⁴ During its conversations with NRC Staff, the Commonwealth requested that it receive the same treatment as NRC Staff afforded to New Jersey just over two months earlier. After NRC Staff rejected, on August 14, 2019, the Commonwealth's request for fourteen days to submit a written response, the Commonwealth asked NRC Staff whether there were extenuating circumstances that caused the Staff to give New Jersey fifteen days to respond but to reject the Commonwealth's request to be treated similarly. NRC Staff was unable to provide any justification and could not explain why it gave New Jersey fifteen days to respond. Instead, Staff said its internal guidance—Procedures for Handling License Transfers—dictates that Staff is to provide states five business days to respond after initial consultation. Those procedures, however, are silent on the amount of time NRC Staff should give a host state to submit comments on the Staff's intention to approve a license transfer application.⁵ NRC Staff's failure to follow what appears to be the NRC's normal state consultation process and its unexplained disparate treatment of the Commonwealth as compared to the State of New Jersey renders its planned action arbitrary and capricious.

Given the NRC Staff's refusal to give the Commonwealth a reasonable amount of time to respond during the consultation process (again, at least the same amount of time it gave New Jersey), the Commonwealth incorporates by reference, as if fully set forth here, the contentions, arguments, and issues it has raised in its yet-to-be acted on Petition for Leave to Intervene and Hearing Request, Docket Nos. 50-293 & 72-1044, filed on February 20, 2019 (Petition); Reply in Support of Petition for Leave to Intervene and Hearing Request, Docket Nos. 50-293 & 72-1044, filed on April 1, 2019 (Reply); and Motion of the Commonwealth of Massachusetts to Supplement Its Petition with New Information, Docket Nos. 50-293 & 72-1044, filed on April 24, 2019. Consistent with the concerns raised in those filings, there are at least two substantive issues that require the NRC Staff to, at a minimum, re-evaluate its plan to approve the license transfer application and Exemption Request if not deny them outright. These two issues go to the heart of this matter—Holtec's ability to satisfy the NRC's financial and technical requirements for license transfer approval—and should make any regulator take the time to

Protection, LLC and Holtec Decommissioning International, LLC (Oyster Creek Nuclear Generating Station) (Jun. 20, 2019), Docket Nos. 50-219 & 72-15, at 20 (ADAMS Accession No. ML19095A457).

⁴ *Id.* at 20.

⁵ See generally *U.S. Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, NRR Office Instruction, Change Notice: Procedures for Handling License Transfers*, LIC-107, Revision 2 (Jun. 5, 2017) (hereinafter, *Procedures for Handling License Transfers*). Another Staff action in this matter was, however, inconsistent with the actual terms of that license transfer processing Instruction. While the Instruction provides that NRC Staff must give the *Commission* at least “5 work days” to object to issuance of the Staff approval order before it is issued, *id.* at 13, the Staff sent a notice to Entergy on August 15, 2019, which stated that Pilgrim's license had *already* been “issued to [Holtec].” Encl. at 2 *in* Ltr. from Scott P. Wall, Sr. Project Manager, NRC Plan Licensing Branch III, to Brian R. Sullivan, Site Vice President, Entergy (Aug. 15, 2019) (ADAMS Accession No. ML19191A006). That notice and its statement that the license had already been “issued” to Holtec was then published in the Federal Register on August 20, 2019. 84 Fed. Reg. 43,186, 43,186 col.3 (Aug. 20, 2019).

seriously question and evaluate the veracity of Holtec's assertions, including awaiting the completion of an adjudicatory hearing on them to ensure that all issues have been fully aired and considered.

First, Holtec's response to the NRC Staff's July 26, 2019 Request for Additional Information (RAI) belies any claim that Holtec has satisfied the NRC's financial qualification and assurance requirements for either the license transfer or the Exemption Request. In fact, after Holtec's misleading response to that request is corrected, Holtec's cash-flow analysis shows that Holtec will suffer a funding shortfall of more than \$50 million. In its original cash-flow analysis, Holtec claimed a year ending decommissioning trust fund balance of \$3.615 million for the year 2063 (projected end of project life).⁶ In developing this analysis, Holtec used a license termination cost of \$592,553,322.⁷ In response to NRC Staff's RAI, Holtec completed a revised cash flow analysis based on the Minimum Formula Amount (MFA), as required by 10 C.F.R. § 50.75(c).⁸ The revised MFA-based cash flow analysis increased the license termination cost by \$40,714,236 to a total of \$633,267,558.⁹ Yet, despite the \$40 million plus cost increase, and a claim that it used the same assumptions in its revised analysis that it used in its original analysis, Holtec's recent analysis provides a positive year-end trust balance of \$11,595,232.¹⁰ In other words, despite increasing its costs, Holtec's analysis results, inexplicably in a higher positive year-end balance. To derive this result in its revised analysis, Holtec appears to have excluded the tax impact on each year-end-earnings-balance that it accounted for in its original cash-flow analysis despite stating to NRC Staff that it included the tax impact.¹¹ When taxes are accounted for in the revised MFA-based cash-flow analysis, the analysis actually shows a funding shortfall of more than \$50 million.

Second, the misleading nature of Holtec's RAI response appears to be part of a troubling pattern of behavior that raises serious questions about Holtec's veracity, judgment, and technical qualifications to decommission a nuclear power reactor. In October 2010, for example, the Tennessee Valley Authority (TVA) temporarily debarred Holtec and required the company to pay a \$2 million "administrative fee" based on the results of a criminal investigation into an

⁶ *Revised Post-Shutdown Decommissioning Activities Report and Revised Site-Specific Decommissioning Cost Estimate for Pilgrim Nuclear Power Station*, Enclosure 1, at 47 (Nov. 16, 2018) (ADAMS Accession No. ML18320A040).

⁷ *Id.*

⁸ *Response to NRC Request for Additional Information*, at E-4-5 and Enclosure (Jul. 29, 2019) (ADAMS Accession No. ML19210E470).

⁹ *Id.* Holtec stated that its lower license termination cost estimate is more accurate because it includes site-specific data to Pilgrim, but, as NRC Staff explained in its RAI, Holtec's cash-flow analysis does not comply with the NRC's regulations and, for that reason, cannot be "more accurate." And Holtec's attack on that regulation, of course, constitutes an improper challenge to an NRC regulation. Moreover, a large Boiling Water Reactor, such as Pilgrim, has never been decommissioned in the United States. Additionally, as stated in the Commonwealth's Petition and Reply, Holtec has not provided adequate details as to how its costs are realistic or related to Pilgrim.

¹⁰ *Id.*

¹¹ *Id.*

alleged Holtec contract-bribery scheme.¹² The TVA employee, who, according to the TVA Inspector General's Report, received \$54,000 in undisclosed payments funneled to the employee from Holtec to help Holtec secure a contract with TVA, pleaded guilty in 2007.¹³ In a recorded telephone conversation between that employee and an individual who appears in the report to be a Holtec official, during which the employee asked the Holtec official for advice on how to handle the TVA Inspector General's inquiry, the Holtec official informed the employee to tell the investigators that the employee did not "know anything about [the payments], other than the fact that your wife was in the business of doing consulting services and it was a payment retainer for that work."¹⁴ More recently, New Jersey's Economic Development Authority (EDA) froze a \$260 million tax break secured by Holtec when it discovered that Holtec had falsely sworn on its tax break application that the company had never "been barred from doing business with a state or federal agency,"¹⁵ even though, as noted above, TVA temporarily debarred Holtec in October 2010. On April 24, 2019, the NRC itself cited Holtec for two violations of NRC regulatory requirements.¹⁶ And, Holtec's business "partner" for its nuclear decommissioning venture, SNC-Lavalin, which Holtec has leaned on heavily to support its claimed technical capacity to undertake multiple complex decommissioning projects at the same time,¹⁷ faces its own legal troubles having been caught-up in numerous alleged international bribery scandals.¹⁸ Of course,

¹² Office of the Inspector General, TVA, Semiannual Report 18 (Apr. 1, 2015 - Sept. 30, 2015), <https://oig.tva.gov/reports/semi59.pdf>; *see also* Office of the Inspector General, TVA, Semiannual Report 8 (Oct. 1, 2010 - Mar. 31, 2011), <https://oig.tva.gov/reports/semi50.pdf>.

¹³ Office of Inspector General, TVA, Report of Administrative Inquiry 1 (Mar. 23, 2010), <https://www.politico.com/states/f/?id=0000016b-d7ca-d6eb-a96f-fffebfa70001>; Andrew Seidman & Catherine Dunn, *Holtec Funneled \$50,000 to Federal Employee in Bid to Win Contract, Inspector General Report says*, *The Philadelphia Inquirer*, Jul. 9, 2019, <https://www.inquirer.com/business/holtec-tennessee-valley-authority-nj-tax-credit-investigation-20190709.html>.

¹⁴ Office of Inspector General, TVA, Report of Administrative Inquiry 4 (Mar. 23, 2010), <https://www.politico.com/states/f/?id=0000016b-d7ca-d6eb-a96f-fffebfa70001>.

¹⁵ Nancy Solomon & Jeff Pillels, *Holtec's \$260 Million Tax Break Frozen by NJ EDA*, *WNYC News*, June 4, 2019, <https://www.wnyc.org/story/holtecs-260-million-tax-break-frozen-eda/>; *see also* Ryan Hutchins, *Task Force Uncovers Bombshell Report on Holtec*, *Politico*, Jul. 10, 2019, <https://www.politico.com/newsletters/new-jersey-playbook/2019/07/10/task-force-uncovers-bombshell-report-on-holtec-454824>.

¹⁶ Notice of Violation to Holtec International, NRC OE EA 18-51, 2019 WL 2004418 (Apr. 24, 2019) (ADAMS Accession No. ML19072A128).

¹⁷ Applicants' Answer Opposing the Commonwealth's Mot. to Supplement its Petition with New Information at 8 (May 2, 2019); *see also* Holtec Response to NRC Request for Additional Information at Encl., p.2 (Apr. 17, 2019) (ADAMS Accession No. ML19109A177). In its RAI Response, for example, Holtec relies on the size of SNC-Lavalin's workforce to support its assertion that it will have adequate support for its planned multi-reactor decommissioning endeavor, but SNC-Lavalin is currently restructuring its business and reducing its work force. *Compare id.* at E-2, *with, e.g. infra* note 19.

¹⁸ *See, e.g.,* Richard L. Cassin, *Former SNC-Lavalin Chief Pleads Guilty in Bribery Case*, *The FPCA Blog*, Feb. 4, 2019, <https://www.fcpcablog.com/blog/2019/2/4/former-snc-lavalin-chief-pleads-guilty-in-bribery-case.html>; *SNC-Lavalin Opts for Judge-Only Trial in Corruption*

any serious criminal or regulatory actions taken against Holtec, or its partners or executives, will have the potential of further draining resources and hampering Holtec's ability to perform decommissioning in a timely, safe and fiscally responsible manner.¹⁹

Those issues would be problematic if Holtec's obligations were limited to Pilgrim. But, as NRC Staff is aware, they are not limited to Pilgrim. In fact, Holtec is planning to embark on an uncharted path of attempting to decommission *six* nuclear power reactors at four different nuclear generating stations in four different states. The unprecedented nature of this endeavor and the cumulative impacts on Holtec's capacity to follow through on those commitments makes this license transfer application and Exemption Request *sui generis* and outside, for that reason alone, the license transfer actions contemplated by the Commission when it adopted its Subpart M Procedures (10 C.F.R. sub. pt. M). Holtec's unprecedented plan exacerbates all of the issues and concerns raised above and in the Commonwealth's Petition, Reply, and Motion to Supplement, and, in connection with the history described above, demands a heightened degree of scrutiny by NRC Staff and the Commission before any final action is taken on the license transfer or Exemption requests. While Holtec may be comfortable attempting to do what has never been done before, that is cold comfort for the Commonwealth and its citizens who have to accept Holtec as its new resident and the risks that accompany it all before the Commonwealth has an opportunity to present its views in an adjudicatory hearing. That concern is made all the worse by the fact that Holtec has asked the NRC to delete a pre-existing license condition upon which the public and the Commonwealth have relied that requires the Pilgrim licensee to have access to a \$50 million contingency fund for, among other things, "safe and prompt decommissioning." Renewed License No. DPR-35 at 4, ¶ J(4). Certainly, these facts preclude any "no significant hazards consideration" finding or reliance on a National Environmental Policy Act categorical exclusion since the proposed action does much more "than [simply] conform the license to reflect the transfer action." 10 C.F.R. § 2.1315. Indeed, granting the requested actions at Pilgrim and the other power stations will materially and significantly increase the risk to public health, safety, and the environment.

* * *

The Commonwealth appreciates the opportunity to provide written comments to NRC Staff about Staff's intention to issue an order approving the license transfer application and Exemption Request. For the reasons noted above and in its prior filings, the Commonwealth does not believe that Holtec has met the NRC's financial and technical qualification

Case, CBC News, June 28, 2019, <https://www.cbc.ca/news/canada/montreal/snc-lavalin-trial-corruption-bribery-judge-1.5193975>.

¹⁹ Indeed, as the Commonwealth noted in its Reply in Support of its Motion to Supplement its Petition with New Information at 3 n.4 (May 9, 2019), SNC-Lavalin's legal troubles have had serious consequences for the company. Just recently, in fact, SNC-Lavalin made a dramatic cut to its dividend payments, lost half of its shareholder value this year, and announced a major restructuring and downsizing of its business. *E.g.*, Shanti S. Nair, *SNC-Lavalin Cuts Dividend, Posts Wider-Than-Expected Loss as Costs Run High*, Reuters, Aug. 1, 2019, <https://www.reuters.com/article/us-snc-lavalin-results/snc-lavalin-cuts-dividend-posts-wider-than-expected-loss-as-costs-run-high-idUSKCN1UR4FQ>.

requirements for license transfer approval. Indeed, the Commonwealth has serious concerns about Holtec's financial and technical capacity to complete the work at Pilgrim. At a minimum, this history requires a heightened degree of scrutiny by the NRC and its Staff. And, for all of these reasons, including the fact that a "no significant hazards determination" would be erroneous in the circumstances of this matter, the Commonwealth requests that the NRC Staff withhold issuance of the license transfer and Exemption Request approvals until the NRC Staff has fully addressed these issues and the Commonwealth has had an opportunity to contest the requested actions in a full hearing before the Commission prior to any NRC Staff action.

Sincerely



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